Cheung Kong Plantations Sdn Bhd v Malayan United Finance Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P-02-24 OF 1997

GOPAL SRI RAM, DENIS ONG AND HAIDAR JJCA

23 FEBRUARY 2000

Civil Procedure *— Judgments and orders — Default judgment — Setting aside — Delay of five years in making application to set aside — Judgment in default not a nullity — Test to be applied in setting aside — Whether application to set aside judgment was correctly dismissed*

The respondent obtained a judgment in default against the appellant on 13 November 1986. The appellant entered appearance on 25 November 1986. However, the summons to set aside the default judgment was not taken out until 23 September 1991. The High Court judge declined to set aside the judgment in default on two grounds: (i) the delay of five years in the making of the application; and (ii) there were no issues that merited a trial. The appellant appealed. It was submitted that the judgement in default was a nullity and thus the appellant was entitled to have it set aside ex debito justitiae.

Held, dismissing the appeal:

(1) Having carefully scrutinized the pleadings and the judgment, the court arrived at the same conclusion as the High Court judge namely, that the judgment was regularly entered. So far as the default interest point was concerned, the documents executed by the parties, when read in their proper context, permitted the recovery of such interest. Therefore, the court was constrained to reject the appellant's argument that the judgment in default was a nullity (see p 268F–G).

(2) In an appeal against the exercise of discretion by a judge in the court below, the appellate court has the initial function of review only. The appellate court has no original discretion. It is only when an appellant can satisfy the appellate court that the trial judge had taken into account irrelevant considerations or omitted relevant considerations or had otherwise misdirected himself on the law that an appellate court is entitled to exercise a discretion of its own. Having carefully perused the judge's judgment, the court was unable to detect any appealable error and was satisfied that he had acted correctly in dismissing the appellant's application to set aside the default judgment (see pp 268H–269A).

[Bahasa Malaysia summary

Responden telah mendapat satu penghakiman ingkar terhadap perayu pada 13 November 1986. Perayu telah memasuki kehadiran pada 25 November 1986. Bagaimanapun, saman untuk mengetepikan penghakiman ingkar tersebut tidak dikeluarkan sehingga 23 September 1991. Hakim Mahkamah Tinggi enggan untuk mengetepikan penghakiman ingkar tersebut atas dua alasan: (i) kelewatan selama lima tahun dalam membuat permohonan tersebut; dan (ii) tiada isu-isu yang memeritkan perbicaraan tersebut. Perayu telah membuat rayuan. Adalah dihujahkan bahawa penghakiman ingkar tersebut adalah satu pembatalan dan oleh itu perayu berhak untuk mengetepikannya ex debito justitiae.

Diputuskan, menolak rayuan tersebut:

(1) Setelah meneliti pliding-pliding dan penghakiman tersebut dengan teliti, mahkamah telah tiba kepada keputusan yang sama seperti hakim Mahkamah Tinggi terutamanya, bahawa penghakiman tersebut telah dimasukkan seperti biasa. Setakat perkara faedah keingkaran adalah berkenaan, dokumen-dokumen yang dilaksanakan oleh pihak-pihak tersebut, apabila dibaca dalam konteks yang betul, membenarkan faedah tersebut dikembalikan. Oleh itu, mahkamah dihalang dari menolak hujahan perayu bahawa penghakiman ingkar tersebut adalah satu pembatalan (lihat ms 268F–G).

(2) Di dalam satu rayuan terhadap penggunaan bidang kuasa seorang hakim dalam mahkamah rendah, mahkamah rayuan mempunyai fungsi utama untuk mengkaji semula sahaja. Mahkamah rayuan tidak mempunyai budi bicara asal. Ia adalah apabila seorang perayu boleh memuaskan hati mahkamah rayuan bahawa hakim perbicaraan telah mengambil kira pertimbangan-pertimbangan yang tidak relevan atau tertinggal pertimbangan-pertimbangan yang relevan atau telah sebaliknya salah arah diri beliau tentang undang-undang bahawa mahkamah rayuan adalah berhak untuk menggunakan budi bicaranya sendiri. Setelah meneliti penghakiman hakim tersebut, mahkamah tidak dapat mengenal pasti apa-apa kesilapan rayuan dan berpuas hati bahawa beliau telah bertindak betul dalam menolak permohonan perayu untuk mengetepikan penghakiman ingkar tersebut (lihat ms 268H–269A).]

Notes

For cases on default judgments generally, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2748–2749.

Cases referred to

Hong Leong Equipment Sdn Bhd v Manfo Development Sdn Bhd & Anor [1986] 1 CLJ 417 (refd)

A *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223 (refd)
Lian Keow Sdn Bhd & Anor v Overseas Credit Finance (M) Bhd & Ors [1982] 2 MLJ 162 (refd)
Malaysia Building Society Bhd v Lim Kheng Kim & Ors [1988] 3 MLJ 175 (refd)
B *Tasmania, The* (1890) 15 App Cas 233 (refd)
Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30 (refd)
Yong Mok Hin v United Malay States Sugar Industries Ltd [1967] 2 MLJ 9 (refd)

C **Appeal from:** Civil Suit No 22–34 of 1986 (High Court, Pulau Pinang)

Mahinder Singh Dulku (*Harjit Singh* with him) (*Harjit Singh Sangay & Co*) for the appellant.

Toh Lee Hong (*Kek Boon Wei* with her) (*Kek Ooi & Lee Hong*) for the
D respondent.

Gopal Sri Ram JCA (delivering oral judgment of the court): This is an appeal directed against the order of the High Court in Penang dismissing an application to set aside the judgment in default entered against the appellant as long ago as 13 November 1986.

E The facts that form the background to this case have been dealt with in extenso by the learned judge in his judgment. We find it unnecessary to repeat them here. Suffice to say that the respondent had on 26 September 1986 commenced an action against the appellant and two other persons for recovery of a loan made by it to the appellant. The second and third
F defendants in the court below had guaranteed that loan. After the writ had been served, the second and third defendants entered an appearance. We have been advised by counsel that there were proceedings for summary judgment between the respondent and those defendants. There is another appeal pending be before this court in respect of those proceedings with which we are not concerned here today. In the meantime, judge in default
G was entered against the appellant on 13 November 1986.

It was not until after the respondent had commenced winding-up proceedings that the appellant's solicitors realized that they had neither entered an appearance nor delivered a defence. Steps were then taken to enter an appearance and to set aside the judgment. It may be added for good
H measure that although appearance was entered on 25 November 1986, the summons to set aside the default judgment was not taken out until 23 September 1991.

In declining to set aside the judgment in default, the learned judge relied on two grounds. First the delay of some five years in the making of the application. In this context, he referred to and relied on the judgments
I of Edgar Joseph Jr J (as he then was) in *Malaysia Building Society Bhd v Lim Kheng Kim & Ors* [1988] 3 MLJ 175 and in *Hong Leong Equipment Sdn Bhd v Manfo Development Sdn Bhd & Anor* [1986] 1 CLJ 417. He also relied

on the judgment of this court *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223 and that of the Federal Court in *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30. Of these, the last two were plainly binding on him. After a careful scrutiny of the explanation advanced by the appellant, the learned judge came to the conclusion that the delay was unreasonable.

The second point on which the judge proceeded was the merits of the case itself. He came to the conclusion the rate of interest upon which complaint had been made before him was really a matter upon which the respondent had a discretion. In other words, there was a contractual power in the respondent to vary the interest. After careful consideration of the evidence led before him, he concluded there was no merit in the sense there was no issues that merited a trial.

Before us, Mr Mahinder Singh Dulku has argued with much force that the judge in default was a nullity. He has drawn our attention to what he says is a serious deficiency in the statement of claim. He submits that the judgment in default is ambiguous just as the judgement in default was in *Tuan Haji Ahmad Abdul Rahman*'s case. The mainstay of his argument is that since the judgment in default is a nullity, he is entitled to have it set aside ex debito justitae notwithstanding the delay complained of by the respondent.

The other complaint is that the impugned judgment includes default interest which, it is said, the respondent was plainly not entitled to recover. It follows, counsel argues, that judgment was entered for too much and is therefore a nullity. However, Mr Mahinder Singh readily concedes that these arguments were not canvassed before the learned judge but contends that since it is a matter upon which further evidence is not required, it may be raised at the appellate stage (*Yong Mok Hin v United Malay States Sugar Industries Ltd* [1967] 2 MLJ 9, applying *'The Tasmania'* (1890) 15 App Cas 233).

We will assume, without deciding, that it is indeed open to Mr Mahinder Singh to take the point before us. However, having carefully scrutinized the pleadings and the judgment, we arrive at the same conclusion as the learned judge namely, that the judgment was regularly entered. So far as the default interest point is concerned, our attention has been drawn by respondent's counsel to the documents executed by the parties which, when read in their proper context, permits the recovery of such interest. We are therefore constrained, with respect, to reject the arguments of Mr Mahinder Singh that the judgment in default was a nullity.

Accordingly, the case turns upon whether the learned judge exercised the discretion vested in him correctly in refusing to set aside the judgment in default. We have said on numerous occasions that in an appeal against the exercise of discretion by a judge in the court below this court has the initial function of review only. We have no original discretion. It is only when an appellant can satisfy the appellate court that the trial judge had taken into account irrelevant considerations, or omitted relevant

considerations or had otherwise misdirected himself on the law that an appellate court is entitled to exercise a discretion of its own: *Lian Keow Sdn Bhd & Anor v Overseas Credit Finance (M) Bhd & Ors* [1982] 2 MLJ 162.

Having carefully perused the learned judge's judgment, we are unable to detect any appealable error and are satisfied that he acted correctly in dismissing the appellant's application to set aside the default judgment.

For the reasons stated above, the appeal is dismissed with costs. The orders made in the court below are affirmed. The deposit to be paid out to the respondent to account of its taxed costs.

Appeal dismissed.

Reported by Jafisah Jaafar